IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGEMENT NO.327 OF 2004
IN
SUMMARY SUIT NO.3843 OF 2003

Maxwell Industries Ltd. Plaintiff

versus

Shankar Traders and others Defendants

Mr.Sachin Masurkar, adv. for plaintiff.

Mr.M.G.Sharma, adv. for defendants.

CORAM : S.C.DHARMADHIKARI, JJ.

DATE : 18th February 2005

PC :

1. Heard Mr.Masurkar for the plaintiffs. Mr.Sharma appears for defendant no.2. Although appearance is entered by Ms.Anjana K. Bakshi for defendant no.3, none appears. I have perused the affidavit filed in reply by defendants 2 and 3. Mr.Masurkar proceeds on the basis of denials. In view of this, his request for an adjournment to file affidavit in rejoinder is declined.

2. This is a summary suit filed by the plaintiffs company against a partnership firm as

well as partners. This partnership firm is carrying on business at Lucknow in the State of Uttar Pradesh.

3. It is the case of the plaintiffs that from June 2000 to September 2001 they have supplied goods as per specifications and orders of defendants. For this purpose invoices were drawn which have been duly received. There is no dispute about goods being received. There is no dispute insofar as their quality and quantity. It is the case of the plaintiff that based on these invoices part payments have been made by the defendants. The balance of Rs.44,95,765/- remained as on 30th September 2001,. The amounts mentioned in para no.3 of the plaint were outstanding as on this date. Two cheques have been forwarded in the month of October 2001 and November 2001 drawn on Union Bank of India, Branch at Lucknow. These cheques were dishonoured on presentation. Plaintiffs, therefore, sent a notice and filed criminal complaint invoking Section 138 R/W 141 of Negotiable Instruments Act, 1881 in the Metropolitan Magistrate’s Court, at Andheri, Mumbai.

4. It is the case of the plaintiffs that thereafter in personal meetings the liability has been admitted and four cheques for a total sum of Rs.12.50 lakh have been forwarded in part payment of the sum mentioned above. These cheques have duly been encashed and now the balance is Rs.32,45,765/-.

5. It is the case of the counsel for plaintiffs that defendants have duly admitted their liability and it is in pursuance of that, that firstly two cheques were forwarded which were dishonoured and later on time was sought and part payment of Rs.12.50 lakh came to be made leaving balance as aforesaid.

6. Upon appearance being entered the summons for judgement has been taken out. The summons has been duly served on all the defendants.

7. In response to the summons for judgement, an affidavit-in-reply has been filed by defendant no.2. The affidavit proceeds to state that story as set out in the plaint is not true and correct. There has been a transaction but it was the practice of the plaintiffs to take blank cheques before supplying the goods. On this basis the

business relations were going on but it appears that when blank cheques were demanded for future supply vide Exhibit-B to the affidavit in reply that the disputes started. It is the case of the defendant no.2 that plaintiffs misused blank cheques, filled up the amount and the date thereon and thereafter have proceeded to allege that amounts are due and payable by the firm. In para no.9 of this affidavit there is a reference to some disputes between the plaintiffs and the officer of Delhi Branch and other partners of the firm. There is a reference to an advertisement given in October 2001 for appointment of another distributor by the plaintiffs. It is contended that after this advertisement was noticed second defendant requested the plaintiffs to return the blank cheques. The proceedings u/s 138 are admitted. A reference is made to a letter dated 6th December 2001 addressed to the advocate for the plaintiffs. Obviously, this is with reference to Section 138 proceedings.

8. Thereafter in para no.15 of this affidavit, the following is stated :-

> 15) I say that then on dated 09.01.2003 a meeting was arranged between the authorities of the plaintiff’s company

> two elder brothers Mr.V.M.Arora and Mr.Suhas Arora of the Defendant No.2 and some other persons. In that meeting it was negotiated between the brothers of the defendant No.2 and the authority of the plaintiff's company that if the defendant No.2 is ready to pay Rs.12,50,000/- in satisfaction of the entire claim of the plaintiff then the plaintiff's company will withdraw all the cases pending in different courts against the Defendant no.2. The plaintiff further assured that no action against the Defendant No.2 will be taken by the plaintiff in future also. The two elder brothers Mr.V.M.Arora and Suhas Arora agreed as there was no other way to save the life of their younger brother and thus the Defendant No.2 was informed by his elder brothers and directed him to arrange as much as money, he can arrange, rest of the amount will be paid by the elder brothers of the defendant no.2. The defendant crave to leave and refer to rely upon the affidavit of Mr.V.M.Arora and Suhas Arora as and when produced."

The sum and substance of the contents of this affidavit is that the amount of Rs.12.50 lakh is paid in full and final settlement, and therefore, as far as this defendant (defendant no.2) is concerned, nothing is due and payable by him. In para no.19 of this affidavit leave is sought to defend the proceedings on this basis.

9. It is pertinent to note that affidavit is filed by the Constituted Attorney of defendant no.2.

10. Mr.Sharma appearing for defendant no.2

points out that the entire dispute was settled for the aforesaid sum of Rs.12.50 lakh which has been paid and therefore, nothing remains to be paid towards the transaction mentioned in the plaint.

11. Surprisingly the affidavit filed in reply to this summons for judgement by defendant no.3 who is also a partner, does not corroborate at all the aforesaid statements. On the other hand, it proceeds to state that there are several disputes between the partners of the first defendant firm and defendant no.3 has not taken any part in the business. Defendant no.3 sets up the plea of dissolution of the firm with effect from 1st April 2001. This bald and vague assertion appears in para no.2 of the plaint. To me, it is apparent that cheques have been handed over after the alleged date of dissolution. Therefore, it is contended in this very affidavit by the 3rd defendant that he has not signed those cheques nor had he authorised anybody to sign the same. He alleges that concerned defendant has done this in his personal capacity. He has contended that he is not operating the bank account at all. In paras 3 and 4 of this affidavit this is what is stated by third defendant :-

> 3. The Defendant No.3 is not aware of Amount of Rs.12,50,000/- paid to the Plaintiff. it is not paid from the Firm’s Account to the knowledge of the Defendant No.3. During the period the Defendant No.3 was a partner.
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> 4. The Defendant No.3 is totally unaware of the said Business Transaction. The Defendant No.2 has also written a letter to Assistant Commissioner of Sales Tax that the "Shankar Traders" have closed the business and Defendant No.2 only actively participated in the business without the knowledge and concern of other partners. The Defendant No.3 is not aware about his whereabouts.

12. On perusal of these affidavits, in my view, it is clear that the defendants are liable to pay the amounts under the transaction referred to in the plaint. It is not as if the account is fully and finally settled and the dealings have been closed. It is surprising that after the amounts have been paid in the year 2003 there are proceedings u/s.139 of Negotiable Instruments Act. These proceedings u/s 138 are still going on and it is not the case of the defendants that the said proceedings have also to come to an end upon payment of Rs.12.50 lakh.

13. Be that as it may, if amount of Rs.12.50 lakh is to be paid in full and final settlement, then the defendant no.3 would have corroborated

the story. Even the assertion of Defendant No.2 is self contradictory. There is no affidavit from the rest of the defendants. Despite this, it is not the case where it could be said that the defence as raised is totally frivolous or vexatious and does not merit any consideration. At this stage all that can be said is that the defendant no.2 on the strength of the documents annexed to his affidavit has raised an arguable plea of dealings and transactions coming to an end on payment of Rs.12.50 lakh. In my view, this is a fit case where conditional leave should be granted to the defendants to defend the suit. This would meet the test laid down by Hon'ble Supreme Court in the case of M/s.Machalec Engineers & Manufacturers Vs. M/s.Basic Equipment Corporation reported in AIR-1977-SC-577. In my view, applying the test laid down by Supreme Court, the request of Mr.Sharma to grant unconditional leave at least to defendant no.2 deserves to be granted. On the other hand, considering the totality of the circumstances, following order would meet the ends of justice.

14. Conditional leave is granted to Defendant Nos.1, 3 and 4 to defend the suit on deposit of

Rs.12.50 lakh (Rs.Twelve lakh fifty thousand only) in this Court within a period of 12 weeks from today. Needless to state that on the amount being deposited it shall be invested in fixed deposit in a nationalized bank. On the amount being deposited as above, the suit shall be transferred to the list of commercial cases with usual directions as to filing of written statement, discovery and inspection etc.. In default, the matter to be proceeded further in accordance with law.

15. Mr.Masurkar to hand over copy of affidavit filed by defendant no.3 to Mr.Sharma.

(S.C.DHARMADHIKARI, J.)